tion of a treaty.[17] It is also significant that for some time the convention was inclined to reserve disputes between the states in regard to territory and sovereignty — which of all would have seemed the only ones which might need enforcement — for the Senate.[18] And when the broad grant of jurisdiction to the judicial power was finally made we find a contemporary diarist noting that it extended to all controversies of a legal nature between the states.[19] Granting as we do that all disputes between units of a federation are justiciable we may also insist that the coercion of a unit may well be beyond the limitation implied in the words "of a legal nature." Otherwise it would be difficult to explain why so bitter an opponent of Article III as Luther Martin — who also desired that rebellion under state authority should not be treason[20] — took no exception to this grant of power.

It would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress. It is clear both from the history of the case and the language of the opinion that the court finds weighty considerations of policy against claiming it now. Where both historical authority and long judicial practice can consistently join with sound political policy it is well gratefully to declare the union.

SUIT UNDER FOREIGN STATUTE GIVING PERSONAL REPRESENTATIVE THE RIGHT TO RECOVER FOR DEATH BY WRONGFUL ACT. — In considering the subject of statutory right of action for death by wrongful act three questions in the main present themselves: (1) Where may such an action be maintained? (2) In what capacity does the personal representative bring suit? (3) As properly construed, what is the scope of the term "personal representative" as used in these so-called "death statutes"? In general, these questions have not been answered by the courts in a wholly satisfactory manner. It will be profitable to set forth what is conceived to be the correct way of dealing with the subject on principle as illustrated by the more satisfactory decisions, before indicating the effects produced by erroneous theories.

Despite its statutory origin, the right of action for death by wrongful act should be placed in the category of transitory actions on which suit may be maintained in any tribunal having jurisdiction over the person of the defendant. This proposition, sustained by the weight of authority,[1] is of course subject to the qualification that the foreign statute creating the right must be consistent with the policy of the *lex fori*.

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[17] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, 245, 247; Vol. II, 157.

[18] FARRAND, *supra*, Vol. II, 160, 170, 183, 186.

[19] FARRAND, *supra*, Vol. III, 169.

[20] FARRAND, *supra*, Vol. III, 223.

[1] Dennick *v.* Ry. Co., 103 U. S. 11 (1880); Knight *v.* Ry. Co., 108 Pa. 250 (1885). *Contra*, Wabash Ry. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888 (1901); Richardson *v.* N. Y., etc. Ry. Co., 98 Mass. 85 (1867). See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), §§ 196, 198.

However, the existence of a "death statute" in the jurisdiction where suit is brought should not be indispensable to indicate a similarity of policy.[2]

The statutes vary in their provisions respecting the party or parties plaintiff in actions thereunder.[3] As the statute of the *locus delicti* creates the right, it should be, and is usually held to be, determinative as to the person or persons who are vested with that right.[4] Where the heirs, widow, husband, parents, guardian, or beneficiaries are designated, no difficulty arises as to the capacity in which they maintain suit, or as to the interpretation of terms. Where, however, the right of action is conferred upon the personal representative, it becomes necessary to determine whether he sues *qua* executor, *qua* administrator, or otherwise, and whether, properly construed, the term "personal representative" includes one appointed by a court other than that of the *locus delicti*. The common statute, of which Lord Campbell's Act is the prototype, creates a wholly new right of action.[5] Damages recovered thereunder are for the benefit of the widow or next of kin and are not assets of the estate of the deceased. Hence the administrator or executor does not sue in his representative capacity but as trustee for the designated beneficiaries.[6] Therefore his ability to maintain suit in any jurisdiction should not be conditional upon his securing ancillary letters of administration.

There seems no justification for placing a narrow interpretation on the term "personal representative." The statutes under consideration are remedial; hence the usual rule of liberal construction should be applied and any representative held authorized to sue irrespective of the jurisdiction in which he was appointed.[7] Confining the meaning of the term to an appointee of the *locus delicti* is not defensible on principle. Normally the domiciliary representative is the first to be appointed. Hence the right of action should accrue to him, and suit thereon be maintainable by him alone.[8]

It is submitted, therefore, that the right of a personal representative to recover under a "death statute" should not be conditioned upon his laying the venue in the jurisdiction where the death occurred, nor upon

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[2] As "death statutes" have been almost universally enacted, the discussion of policy usually turns on the extent of similarity between the local and foreign enactments. The existence of some such statute in the *locus fori* was held requisite in Leonard *v.* Columbia, etc. Co., 84 N. Y. 48 (1881). For an analogous situation, in which the contrary opinion prevailed, see Herrick *v.* Minneapolis, etc. Ry. Co., 31 Minn. 11, 16 N. W. 413 (1883), quoted from and approved in Northern Pac. Co. *v.* Babcock, 154 U. S. 190 (1893).

[3] See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), xix–lxxi.

[4] Usher *v.* West Jersey Ry. Co., 126 Pa. 206, 17 Atl. 597 (1889); Wooden *v.* Ry. Co., 126 N. Y. 10, 26 N. E. 1050 (1891). *Contra*, Stewart *v.* Baltimore, etc. Ry. Co., 168 U. S. 445 (1897).

[5] Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599 (1876); Whitford *v.* Panama Ry. Co., 23 N. Y. 465 (1861); Quinn *v.* Chicago, etc. Ry. Co., 141 Wis. 497, 124 N. W. 653 (1910).

[6] Connor *v.* N. Y., etc. Ry. Co., 28 R. I. 560, 68 Atl. 481 (1908); Boulden *v.* Pa. Ry. Co., 205 Pa. 264, 54 Atl. 906 (1903); Kansas, etc. Ry. Co. *v.* Cutter, 16 Kan. 568 (1876).

[7] Dennick *v.* Ry. Co., *supra*, note 1.

[8] There is a *dictum* to this effect in McCarty *v.* N. Y., etc. Ry. Co., 62 Fed. 437, 438 (1894).

his acquiring ancillary letters of administration in the *locus fori*, nor upon his being appointed by the court of the *locus delicti*, but simply upon the court's having jurisdiction over the person of the defendant as required by due process.

Let us turn now to the erroneous theories and the effects produced thereby. In some jurisdictions it is held that the statutes under consideration do not create a new cause of action, but merely permit a survival to the personal representative of a right which had accrued to his decedent.[9] He must therefore bring suit in his representative capacity and is subject to the rule requiring him to take out ancillary letters in case the venue is not laid in the jurisdiction of the domicile.[10] A further limitation is placed upon the statutory right of action by a singularly narrow interpretation of the term "personal representative." The recent case of *Battese* v. *Union Pacific Ry. Co.*[11] denies that a domiciliary administrator is within this term for purposes of suit under a foreign statute, apparently confining the right of action to an appointee of the *locus delicti*.[12] A combination of these two theories produces the following undesirable results: (1) Assuming that the defendant can be served with process neither at the domicile of the decedent nor in the jurisdiction where the death occurred, ancillary letters of administration must be secured from both the *locus delicti* and the *locus fori*. (2) As the right of action is not for the benefit of the estate, the grant of letters of administration may be denied in a jurisdiction where the decedent left no assets.[13] (3) Where conflicting interpretations are placed on the term "personal representative," *quaere* as to the person in whom is vested the right of action. The construction of a statute of any jurisdiction is for its own courts.[14] However, in the usual case involving the present considerations, a court is called on to construe a foreign statute which has not been interpreted by the court of the jurisdiction of its enactment. The most that can be derived from such a construction is an implied assent that the local statute be similarly construed by foreign tribunals.[15]

RECENT CASES

CHOSES IN ACTION — RIGHTS AND LIABILITIES OF ASSIGNEE — CONTRACT RUNNING WITH A BUSINESS. — A telegraph company agreed to construct and maintain a telegraph line along the right of way of a railroad, as part of the railroad system. The railroad company became bankrupt, and the property

[9] Bellamy *v.* Whitsell, 123 Mo. App. 610, 100 S. W. 514 (1907); St. Louis, etc. Ry. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102 (1909); Louisville Ry. Co. *v.* Raymond's Adm'r, 135 Ky. 738, 123 S. W. 281 (1909).

[10] Brooks *v.* Southern Pac. Ry. Co., 148 Fed. 986 (1906).

[11] 170 Pac. 811 (Kan.) (1918). See Recent Cases, page 1164.

[12] Hall *v.* Southern Ry. Co., 146 N. C. 345, 59 S. E. 879 (1907); Louisville, etc. Ry. Co. *v.* Brantley's Adm'r, 96 Ky. 297, 28 S. W. 477 (1894).

[13] Perry *v.* St. Joseph Ry. Co., 29 Kan. 420 (1883); Jeffersonville Ry. Co. *v.* Swayne's Adm'r, 26 Ind. 477 (1866). *Contra*, Hutchins *v.* St. Paul, etc. Ry. Co., 44 Minn. 5, 46 N. W. 79 (1890); Findlay *v.* Chicago, etc. Ry. Co., 106 Mich. 700, 64 N. W. 732 (1895). See 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2 ed.), § 205.

[14] See 2 SUTHERLAND STATUTORY CONSTRUCTION (2 ed.), § 319.

[15] See 23 HARV. L. REV. 554.